



7020-02

INTERNATIONAL TRADE COMMISSION
[Investigation No. 337-TA-1007, Investigation No. 337-TA-1021
(Consolidated);

Certain Personal Transporters, Components Thereof, and
Packaging and Manuals Therefor
and
Certain Personal Transporters and Components Thereof;

Notice of a Commission Determination to Review in Part a Final Initial Determination;
Schedule for Filing Written Submissions on Certain Issues Under Review and on
Remedy, the Public Interest, and Bonding

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission (“the Commission”) has determined to review in part the final initial determination (“ID”) issued by the presiding administrative law judge (“ALJ”) finding in part a violation of section 337 of the Tariff Act of 1930, as amended, in the above-referenced investigation on August 10, 2017. The Commission requests certain briefing from the parties on the issues under review, as indicated in this notice. The Commission also requests briefing from the parties and interested persons on the issues of remedy, the public interest, and bonding.

FOR FURTHER INFORMATION CONTACT: Michael Liberman, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3115. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2000. General information

concerning the Commission may also be obtained by accessing its Internet server at <https://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted Inv. No. 337-TA-1007, *Certain Personal Transporters, Components Thereof, and Packaging and Manuals Therefor* under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 ("section 337"), on June 24, 2016, based on a complaint filed by Segway, Inc. of Bedford, New Hampshire ("Segway"); DEKA Products Limited Partnership of Manchester, New Hampshire ("DEKA"); and Ninebot (Tianjin) Technology Co., Ltd. of Tianjin, China ("Ninebot") (collectively, "Complainants"). 81 *Fed. Reg.* 41342-43 (Jun. 24, 2016). The complaint alleges a violation of section 337 by reason of infringement of certain claims of U.S. Patent Nos. 6,302,230 ("the '230 patent"); 6,651,763 ("the '763 patent"); 7,023,330 ("the '330 patent"); 7,275,607 ("the '607 patent"); 7,479,872 ("the '872 patent"); and 9,188,984 ("the '984 patent"); and U.S. Trademark Registration Nos. 2,727,948 and 2,769,942. The named respondents for Investigation No. 337-TA-1007 are Inventist, Inc. of Camas, Washington; PhunkeeDuck, Inc. of Floral Park, New York; Razor USA LLC of Cerritos, California; Swagway LLC of South Bend, Indiana ("Swagway"); Segaway of Studio City, California; and Jetson Electric Bikes LLC of New York, New York ("Jetson"). The Commission's Office of Unfair Import Investigations ("OUII") was also named as a party to this investigation. 81 *Fed. Reg.* 41342 (Jun. 24, 2016).

On September 21, 2016, the Commission instituted Inv. No. 337-TA-1021, *Certain Personal Transporters and Components Thereof*, based on a complaint filed by the same

Complainants. 81 *Fed. Reg.* 64936-37 (Sept. 21, 2016). The complaint alleges a violation of section 337 by reason of infringement of certain claims of U.S. Patent Nos. 6,302,230 and 7,275,607. The named respondents for Investigation No. 337-TA-1021 are Powerboard LLC of Scottsdale, Arizona (“Powerboard”); Metem Teknoloji Sistemleri San of Istanbul, Turkey; Changzhou Airwheel Technology Co., Ltd. of Jiangsu, China (“Airwheel”); Airwheel of Amsterdam, Netherlands; Nanjing Fastwheel Intelligent Technology Co., Ltd. of Nanjing, China; Shenzhen Chenduoxing Electronic, Technology Ltd., China, a.k.a. C-Star of Shenzhen, China; Hangzhou Chic Intelligent Technology Co., Ltd. of Hangzhou, China (“Chic”); Hovershop of Placentia, California; Shenzhen Jomo Technology Co., Ltd., a.k.a. Koowheel of Shenzhen City, China; Guangzhou Kebye Electronic Technology Co., Ltd., a.k.a. Gotway of Shenzhen, China; and Inventist, Inc. of Camas, Washington. OUII was also named as a party to this investigation. 81 *Fed. Reg.* 64936 (Sept. 21, 2016). The Commission directed the presiding ALJ to consolidate Inv. Nos. 337-TA-1007 and 337-TA-1021. *See id.* at 64937.

Subsequently, the Commission determined not to review an ID finding respondents PhunkeeDuck, Inc. and Segaway in default. Order No. 9 (Sept. 1, 2016) (*not reviewed* Oct. 3, 2016). The Commission further determined not to review an ID granting complainants’ corrected motion to amend the complaint and notice of investigation to assert the ‘763, ‘330, and ‘872 patents against respondent Jetson Electric Bikes LLC, and to terminate the investigation with respect to all asserted claims of the ‘984 patent as to all respondents. Order No. 17 (Nov. 14, 2016) (*not reviewed* Dec. 7, 2016). The Commission also determined not to review an ID terminating the investigation as to respondent Nanjing Fastwheel Intelligent Technology Co., Ltd. based on a Consent Order Stipulation. Order No. 18 (Nov. 15, 2016) (*not reviewed* Dec. 7, 2016).

The Commission likewise determined not to review an ID granting a motion to terminate the investigation as to the ‘763 patent. Order No. 19 (Dec. 16, 2016) (*not reviewed* Jan. 10, 2017). The Commission further determined not to review an ID finding respondents Shenzhen Chenduoxing Electronic, Technology Ltd., China, a.k.a. C-Star; Shenzhen Jomo Technology Co., Ltd., a.k.a. Koowheel; Guangzhou Kebye Electronic Technology Co., Ltd., a.k.a. Gotway; Metem Teknoloji Sistemleri San; and Airwheel Netherlands in default. Order No. 22 (Jan. 9, 2017) (*not reviewed* Feb. 7, 2017). The Commission also determined not to review an ID terminating this investigation with respect to all asserted claims of the ‘330 patent and the ‘872 patent as to all respondents. *See* Order No. 24 (Jan. 10, 2017) (*not reviewed* Feb. 7, 2017).

Furthermore, the Commission determined to review an ID terminating respondent Inventist, Inc. in this investigation based on a Consent Order Stipulation and proposed Consent Order. Order No. 25 (Jan. 31, 2017) (Notice of Review issued Feb. 22, 2017 (“Notice of Review”)). The Commission requested corrections to be made in the proposed Consent Order. *See* Notice of Review at 2. The corrected Consent Order was filed with the Commission on February 27, 2017. The Commission determined to affirm Order No. 25, and terminated the investigation as to Inventist and issued a Consent Order on October 12, 2017.

The Commission also determined not to review an ID to terminate this investigation as to Razor USA, LLC based on a Settlement Agreement and Release. Order No. 28 (Mar. 22, 2017) (*not reviewed* Apr. 24, 2017). Also, the Commission determined not to review an ID granting Complainants’ motion for summary determination concerning the technical prong of the domestic industry requirement with respect to the asserted trademarks. Order No. 32 (Apr. 6, 2017) (*not reviewed* May 9, 2017). Finally, the Commission determined not to review an ID

granting Complainants' motion to terminate the investigation as to respondent Hovershop for good cause. *See* Order No. 34 (Apr. 13, 2017) (*not reviewed* May 15, 2017).

As a result, the following two patents (and 13 claims) and two trademarks remain at issue in this investigation: claims 1, 3-5, and 7 of the '230 patent; claims 1-4 and 6 of the '607 patent; U.S. Trademark Registration No. 2,727,948; and U.S. Trademark Registration No. 2,769,942.

The following respondents participated in the evidentiary hearing and remain in the investigation: Airwheel, Chic, Jetson, Powerboard, and Swagway.

The evidentiary hearing on the question of violation of section 337 was held from April 18 through April 21, 2017. The final ID finding in part a violation of section 337 was issued on August 10, 2017. The ALJ issued his recommended determination on remedy, the public interest and bonding on August 22, 2017. The ALJ recommended that if the Commission finds a violation of section 337 in the present investigation, the Commission should: (1) issue a general exclusion order ("GEO") covering accused products found to infringe the asserted patents; (2) issue a limited exclusion order ("LEO") covering accused products found to infringe the asserted patents if the Commission does not issue a GEO; (3) issue an LEO covering accused products found to infringe the asserted trademarks; (4) issue cease and desist orders; and (5) not require a bond during the Presidential review period. RD at 1-2; 18. No public interest statements were filed by the public in this investigation.

All parties to this investigation that participated in the evidentiary hearing (with the exception of respondent Powerboard) filed timely petitions for review of various portions of the final ID. The parties likewise filed timely responses to the petitions.

On September 11, 2017, Complainants filed a “Request For Acceptance of Memorandum Correcting Misstatements of the Record Found In Respondents Chic’s and Airwheel’s Oppositions and OUII’S Response to Complainant’s Petition For Review” (“Request”). The IA and Respondents Chic and Airwheel filed timely responsive pleadings opposing Complainants’ Request. The Commission notes that no such further briefing is normally permitted, and that in any event it can resolve the relevant facts from the established record in this Investigation without additional briefing from Complainants or any other party in determining whether to review the final ID. Accordingly, Complainants’ Request is denied.

Having examined the record in this investigation, including the final ID, the petitions for review, and the responses thereto, the Commission has determined to review the final ID in part. In particular, the Commission has determined as follows:

- (1) to review the ID’s determination that the claim term “maximum operating velocity” should be construed to mean “a variable maximum velocity where adequate acceleration potential is available to enable balance and control of the vehicle,” *see* ID at 44;
- (2) to review the ID’s determination that “nothing in the plain language of the disputed limitation [‘the motorized drive arrangement causing, when powered, automatically balanced operation of the system’] from claim 1 of the ‘230 patent requires the operation by a rider. The claim only requires the ‘motorized drive arrangement causing, when powered, automatically balanced operation of the system,’” *see* ID at 82;
- (3) to review the ID’s infringement, validity, and domestic industry (technical prong) determinations pertaining to the ‘230 patent;
- (4) to review the instances in the ID that refer to a disclaimer of “manual input” with respect to the ‘607 patent. On review, the Commission finds that this disclaimer is

actually a disclaimer of “manual input via joystick.” The Commission notes that the ID uses these terms interchangeably and determines not to review any other portion of the ID’s analysis or findings pertaining to this disclaimer. The Commission’s analysis on this issue will be provided in our opinion, which will issue upon conclusion of the investigations;

(5) to review the ID’s finding with respect to actual confusion regarding the SWAGWAY mark, *see* ID at 171-72.

In addition, the Commission has determined to correct two typographical errors: in the first line of the last paragraph on page 170 “the Swagway ‘trademark’” is replaced with “the Segway ‘trademark’”; and in the first line on page 171 “Swagway” is replaced with “Segway”. The Commission has determined not to review the remainder of the ID.

The parties are requested to brief their positions on only the following issues, with reference to the applicable law and the evidentiary record:

1. The ID determined with respect to the ‘230 patent that “the claim term ‘maximum operating velocity’ should be construed to mean ‘a variable maximum velocity where adequate acceleration potential is available to enable balance and control of the vehicle.’” ID at 44.

a. Does intrinsic evidence support the ID’s above determination?

b. Does extrinsic evidence support the ID’s above determination?

2. The ID determined with respect to the ‘230 patent that “nothing in the plain language of the disputed limitation [‘the motorized drive arrangement causing, when powered, automatically balanced operation of the system’] from claim 1 of the ‘230 patent requires the

operation by a rider. The claim only requires the ‘motorized drive arrangement causing, when powered, automatically balanced operation of the system.’” ID at 82.

a. Does intrinsic evidence support the ID’s above determination?

b. Does extrinsic evidence support the ID’s above determination?

In connection with the final disposition of this investigation, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) issue one or more cease and desist orders that could result in the respondents being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered, including against the defaulted respondents. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or are likely to do so. For background, see *Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843, Comm’n Op. at 7-10 (Dec. 1994).

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve or disapprove the Commission's action. *See* Presidential Memorandum of July 21, 2005, 70 FR 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury.

WRITTEN SUBMISSIONS: The parties to the investigation are requested to file written submissions on the issues under review. The submissions should be concise and thoroughly referenced to the record in this investigation. Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest and bonding. Such submissions should address the recommended determination on remedy, the public interest and bonding issued on August 22, 2017, by the ALJ and the appropriate remedy for the respondents previously found in default. Complainants and the Commission investigative attorney are also requested to submit proposed remedial orders for the Commission's consideration.

Complainants are further requested to provide the expiration date of the '230 patent, the HTSUS numbers under which the accused articles are imported, and any known importers of the accused products. The written submissions and proposed remedial orders must be filed no later than the close of business on October 30, 2017. Reply submissions must be filed no later than the close of business on November 6, 2017. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and

Procedure (19 CFR 210.4(f)). Submissions should refer to the investigation number (“Inv. No. 337-TA-1007,’ ‘Investigation No. 337-TA-1021’ (Consolidated))” in a prominent place on the cover page and/or the first page. (*See Handbook for Electronic Filing Procedures*, http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf). Persons with questions regarding filing should contact the Secretary (202-205-2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements. All non-confidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in Part 210 of the Commission's Rules of Practice and Procedure, 19 CFR Part 210.

By order of the Commission.

Issued: October 13, 2017.

Jessica Mullan,
Attorney Advisor.

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